NO. 22291

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARROW DEVELOPMENT COMPANY, INC.,)

Appellant,)

v. )

THE FULTON INSURANCE COMPANY, )

Appellee. )

APPEAL FROM THE UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

# APPELLANT'S BRIEF

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## JURISDICTIONAL STATEMENT

This action was commenced by the filing of a complaint in the Superior Court, Fourth Judicial District, Alaska and thereafter removed to the United States District Court for the District of Alaska, and a final decision dismissing the plaintiff-appellant, Barrow Development Company, Inc.'s, claim against The Fulton Insurance Company was rendered on January 18, 1968.

This appeal is taken from said decision pursuant to the provisions of 28 U.S.C. 1291 which confers jurisdiction of appeals from all final decisions of the United States District Court in the United States Court of Appeals, and 28 U.S.C. 1294(1) which designates the circuit embracing said district as the proper Court of Appeals to which such appeal shall be directed.

## STATEMENT OF FACTS

The facts that give rise to the above case commenced in August of 1964 when Barrow Development Company purchased from the Fulton Insurance Company a certain inventory insurance policy on its goods in its warehouse at Barrow, Alaska, in the sum of $50,000. (Record, p.24). This insurance policy required monthly reporting of the value of the inventory and, if the reports were not made, the maximum amount that would be paid under the policy if the goods were destroyed was $37,500. (Record, p.29).

At approximately the same time that this insurance policy was taken out, Barrow Development Company took out a number of other insurance policies of fire insurance and extended coverage insuring its real property and other property in Barrow, Alaska. (Record, p. 156, 329). The insurance policy in question concerning the inventory and the other insurance policies were purchased through an insurance agent in Nome, Alaska, named Pete Hahn, (Record, p. 112). Mr. Hahn instructed Barrow Development Company to send him the monthly reporting documents for the inventory policy.

After the policy was in effect, Barrow Devel-

opment Company employed Kohler & Johnson, a firm of certified public accountants in Fairbanks, Alaska, to take care of its accounting matters and also to mail in the monthly inventory reports to Pete Hahn in Nome. (Record, p. 113). Kohler & Johnson mailed in certain of these inventory reports to Pete Hahn in Nome and Pete Hahn mailed certain reports on to the company, but at the time of the fire which completely destroyed Barrow Development Company's property in Barrow, Alaska, on December 14, 1964, the monthly inventory reports were not up to date because Pete Hahn had not sent one or two reports to the insurance company and Kohler & Johnson had not forwarded Pete Hahn the latest monthly inventory report 341-2.

After the embers cooled Barrow Development Company made claim to the various insurance companies for its fire losses, including the defendant the Fulton Insurance Company, and the real property damage was paid in total in the approximate sum of $260,000 without any question. (Record, p. 105). From the beginning the defendant Fulton Insurance Company, dragged its feet on paying off the inventory policy. The Fulton Insurance Company demanded of Barrow Development Company a complete and detailed inventory of what burned in the

fire. (Record, p. 99) Barrow Development Company not produce this inventory because its records were destroyed in the fire along with the inventory. (Record, p. 101).

Barrow Development Company filed a proof of loss with the Fulton Insurance Company on the 29th day of January 1965, for a loss of inventory in the sum of $50,000. (Record, p. 100). The Fulton Insurance Company sent General Adjustment Bureau to Barrow, Alaska, and vicinity to investigate Barrow Development Company claim of inventory property loss. The Fulton Insurance Company informed Barrow Development Company that the maximum they would pay under the policy if the value of the inventory could be proved was $37,500 due to the improper filing of the monthly reporting forms. (Record, p. 345). Barrow Development Company being pressed by its creditors, demanded $50,000 from the Fulton Insurance Company for its inventory loss. (Record, p. 102). The Fulton Insurance Company made impossible demands upon Barrow Development Company concerning its inventory, and in response to these demands Barrow Development Company again explained to the Fulton Insurance Company that it could not in detail substantiate its inventory

because the records were destroyed along with the property.

Robert Keller, president of Barrow Development Company wrote Pete Hahn, the agent who sold Barrow Development Company the Fulton insurance policy, on a number of occasions asking why the Fulton Insurance Company was refusing to honor Barrow Development Company's claim and, as the record reflects, Hahn told Keller not to worry, that the Fulton Insurance Company was a tough group but he would be paid in the end and wouldn't have to sue. (Record, p. 342). Almost immediately after this correspondence, it became clear that the Fulton Insurance Corporation's claim for the loss of its inventory, and Robert Keller, as president of Barrow Development Company on the 8th day of February, 1965, filed a lawsuit on behalf of the corporation, with himself acting as attorney, against the Fulton Insurance Company. (Record, p. 39). The Fulton Insurance Company filed an answer to the Barrow Development Company complaint and numerous discovery proceedings occurred thereafter, and the action finally culminated in a judgment of dismissal on the 28th day of March, 1966 for the failure of Barrow Development

Company, to appear for trial. Immediately thereafter Barrow Development Company through its president, Robert Keller, engaged John M. Savage as its attorney and this judgment of dismissal was set aside on the 24th day of June, 1966 upon the payment by Barrow Development Company to the Fulton Insurance Company of the sum of $1510.82 in costs and attorney's fees. (Record, p. 330).

After the case was reinstated, the defendant Fulton Insurance Company, moved to dismiss the Barrow Development Company complaint on the basis that the plaintiff, Barrow Development Company was not a corporation in good standing at the time it filed its complaint originally, it not having filed its annual reports and paid its annual corporation tax in accordance with Alaska statute and that this fact was not pleaded in plaintiff's complaint in accordance with Alaska law. (Record, p. 334). Barrow Decelopment Company admitted that these facts were true and the Superior Court, Third Judicial District, Anchorage, Alaska dismissed Barrow Development Company, Inc.'s complaint without prejudice

on the 13th day of June, 1967. In the meantime on the 20th day of January, 1967, Barrow Development Company, Inc. filed the present action in the Superior Court, Fourth Judicial District, Fairbanks, Alaska against the Fulton Insurance Company for tortious activity in its failure to pay the Barrow Development Company, Inc.'s losses and in its adjustment of the claim and complete handling of the matter. This action was subsequently removed to the United States District Court for the District of Alaska.

The District Court granted summary judgment to the defendant insurance company on the ground that the action had not been brought within a year of the date the loss occurred, as was required under the provisions of the policy even though the complaint charged not a breach of the terms of the contract but rather a tort cause of action.

## SPECIFICATIONS OF ERROR

I

The District Court erred in making Finding of Fact Number 6 in that plaintiff's cause of action sounds in tort rather than contract.

II

The District Court erred in making Finding of Fact Number 9 in that the one-year limitation under the provisions of the fire insurance policy had been tolled by the filing of plaintiff's complaint February 8, 1965

## ARGUMENT

### I

THE COURT ERRED IN FINDING THAT THIS ACTION WAS BROUGHT TO ENFORCE THE PROVISIONS OF THE FIRE INSURANCE POLICY AND THEREBY SUBJECT TO THE ONE-YEAR LIMITATION OF TIME FOR COMMENCEMENT OF AN ACTION CONTAINED IN THE POLICY.

The court found:

> "That the Plaintiff commenced this contract cause of action in connection with the fire insurance policy IFP-343209 to recover damages for inventory losses sustained as a result of the aforementioned fire in the Superior Court for the State of Alaska, Fourth Judicial District, on January 20, 1967."

This finding was clearly erroneous. The complaint sounds in tort and not in contract. The complaint alleges:

> "III
>
> "That on or about December 14, 1964 plaintiff suffered a complete loss by fire of its buildings and inventory at Barrow, Alaska.
>
> "IV
>
> "That plaintiff notified defendant of its loss under the terms of the aforementioned policy and defendant undertook, through its agent, General Adjustment Bureau, the adjustment of the loss caused to plaintiff by the fire.
>
> .....

"VI

"That defendants representative and agent, General Adjustment Bureau, sent an adjuster to Barrow, Alaska to adjust plaintiffs loss and the same was wantonly, recklessly, and negligently adjusted in that the adjuster did not determine by any reasonable means available the value of the goods plaintiff lost in the fire.

"VII

"That plaintiff cooperated with defendant and defendant's agent in adjusting said fire loss to the best extent of his ability and the defendant willfully, maliciously, wantonly, recklessly and negligently never offered to pay plaintiff anything for the loss of plaintiff's inventory in the aforementioned fire.

"VIII

"That plaintiff was informed of defendants refusal to pay plaintiff anything under its policy for plaintiff's loss on or about January 25, 1965 by defendant and its agents.

.....

"X

"That as a direct and proximate result of defendant's willful and malicious acts, the plaintiff was forced to file suit on its claim against the defendant and has never to this date been paid anything for the loss of its inventory by the defendant.

"XI

"Because the defendants acts were willful, malicious and intentional, and designed to injure plaintiff, plaintiff has suffered general damages in the sum of $50,000 plus interest

and plaintiff is entitled to punitive damages in the sum of $50,000 to punish the defendant for its malicious and willful acts."

It is plaintiff's theory that an insurance company owes its insured a duty to exercise reasonable care in the adjustment and settlement of claims; that this duty arises from the relationship of insurer and insured and exists independent of any terms of the contract and that a breach of this duty sounds in tort rather than contract. Practically every jurisdiction in which the question has arisen has held that recovery may be had on such a theory.[1]

The best example is the Supreme Court of California's recent decision in Crisci v. Security Ins. Co. of New Haven, Conn., 426 P.2d 173 (1967), in which the court subscribed to the general view that an insurance company's power to affect the interests of its insured

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[1] See cases cited in Keeton, Liability Ins. & Responsibility For Settlement 67 Harv. L. Rev. 1136, 1138 n. 5

as well as its own interests is accompanied by responsibility for its exercise, regardless of the fact that such responsibility is not expressed in the policy and that the breach of that duty is treated as sounding in tort.

These were the facts in Crisci, supra: An injured claimant brought a negligence suit against the plaintiff who had $10,000 of insurance coverage under a general liability policy issued by defendant. Defendant rejected a $9,000 settlement offer, the suit went to trial and the claimant was awarded a $100,000 judgment against the plaintiff. The plaintiff brought suit against the insurance company for wrongfully refusing to settle within the policy limits. The trial court found that the defendant had breached its duty to settle in good faith, and plaintiff was awarded the amount of the adverse judgment in excess of the policy limits, and, in addition, she recovered $25,000 for mental suffering. The Supreme Court of California affirmed both awards on

the basis of California Civil Code, Section 3333, which provides that:

> "For the breach of an obligation not arising from contract, the measure of damages . . . is the amount which will compensate for all the detriment proximately caused thereby. ."

Crisci was a tort case, and Barrow Development Company, Inc. v. the Fulton Insurance Company is a tort case, and the fact that this action was not started within the time allowed by the policy is quite irrevelant.

A.S. 09.10070 provides that tort actions must be brought within two years; it is clear that this action was brought within the time allowed.

Plaintiff has pleaded a valid cause of action completely independent of the provisions of the fire insurance policy and therefore in no way affected by the one-year limitation contained therein; for this reason the summary judgment granted by the District Court must be reversed and plaintiff given the opportunity to prove--if it can--the material allegations of its complaint.

II

THE TRIAL COURT ERRED IN FINDING THAT THE CONTRACTUAL LIMITATION OF TIME EXPRESSED IN THE PROVISIONS OF THE FIRE INSURANCE POLICY HAD NOT BEEN TOLLED BY THE FILING OF PLAINTIFF'S COMPLAINT FEBRUARY 8, 1965.

The trial court found:

> "That the Plaintiff's contract cause of action was not commenced within one year after the aforementioned fire loss occurred, which was required under the express terms of the fire insurance policy provisions."

This finding was clearly erroneous. Robert A. Keller filed a complaint against The Fulton Insurance Company on behalf of Barrow Development, Inc. February 8, 1965 pleading a contract cause of action. That complaint was dismissed for plaintiff's failure to prosecute March 28, 1966. This dismissal was set aside June 24, 1966. The complaint was dismissed again June 13, 1967. Another complaint, pleading the contractual cause of action, was filed January 11, 1968 and is still pending.

A.S. 09.10240 provides that:

> "If an action is commenced within the time prescribed and is dismissed upon the trial

> or upon appeal after the time limited for bringing a new action, the plaintiff . . . may commence a new action upon the cause of action within one year after the dismissal or reversal on appeal . . . ."

It is the general rule that statutes such as A.S. 09.10.240 apply to contractual as well as statutory limitations. Roth v. Northern Assur. Co., 203 NE.2d 442 (Ill. 1964).

It will be seen, therefore, that at the time this action was brought there was pending -- and there is still pending -- in the Alaskan courts an action by the plaintiff against the defendant alleging a breach of contract. If this action sounds in contract, it may be subject to abatement, but timely it certainly was.

## CONCLUSION

For the foregoing reasons as stated in the arguments in the body of this brief, the United States District Court for the District of Alaska erred in granting the Fulton Insurance Company's motion for summary judgment, and the judgment should be reversed and the United States District Court for the District of Alaska should be instructed to proceed to hear plaintiff-appellant's cause of action.

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